Filed 8/14/19 P. v. Jones CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ELLIOT LAWRENCE JONES, Defendant and Appellant.	F076570 (Super. Ct. No. RF007384A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, Lewis A. Martinez, and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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Elliot Lawrence Jones (defendant) stands convicted, following a jury trial, of kidnapping to commit robbery (Pen. Code,[1] § 209, subd. (b)(1); counts 4-9), first degree burglary, during the commission of which a person other than an accomplice was present in the residence (§§ 460, subd. (a), 667.5, subd. (c)(21); count 10), false imprisonment (§ 237; counts 11-19), robbery (§ 212.5, subd. (a); counts 20-26), and unlawful possession of a firearm (§ 29800, subd. (a)(1); count 27). As to counts 4 through 9 and 20 through 26, he was found to have personally used a firearm pursuant to section 12022.53, subdivision (b), while as to counts 10 through 19, he was found to have personally used a firearm pursuant to section 12022.5, subdivision (a).[2] Following a bifurcated court trial, he was found to have suffered a prior serious felony conviction (§ 667, subd. (a)) that was also a strike (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and to have served two prior prison terms (§ 667.5, subd. (b)). His motions for a new trial and to dismiss his prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) were denied, and he was sentenced to a lengthy prison term.

On appeal, we hold: (1) Substantial evidence supports the convictions on counts 4 through 9; (2) Defendant is not entitled to reversal based on alleged prosecutorial misconduct or related ineffective assistance of counsel; (3) Status enhancements were properly imposed; and (4) Defendant is not entitled to a remand for the court to exercise its discretion whether to strike firearm and/or serious felony enhancements. Accordingly, we affirm.

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1 All statutory references are to the Penal Code.

2 Counts 1 through 3, which charged defendant with kidnapping during which he personally used a firearm (§§ 207, subd. (a), 12022.53, subd. (b)) were dismissed prior to trial pursuant to section 995.

FACTS

As of December 5, 2015, Tony C. resided in an apartment on East Commercial Drive, in Ridgecrest.[3] "Sam" stayed at the apartment sometimes.

Sometime after 6:00 p.m., Alexander B. went to the apartment to socialize. Tony, "T.J.," Leopoldo S., and someone Alexander knew as Casey were already at the apartment when Alexander arrived. Eventually, Tony and Casey left.

Alexander heard knocking on the front door and went to see who it was. Two African-American men, one tall and one shorter, were there. They asked for Tony. Alexander said he was not there right then but should be back soon. He invited the men inside to wait, then headed for the back bedroom, where he was playing video games. The two men walked behind him until they reached the bedroom, where there was a safe next to the door. The men seemed to be angry with Tony. They told those in the bedroom to sit down and pull out their wallets and phones, and they said they were going to take the safe. Each had a handgun. They were trying to figure out the combination to the safe. When Alexander said he did not know it, they started grabbing items and tried to carry the safe out of the apartment. They told Alexander, T.J., and Leopoldo to go in the closet and wait until they got done.

The two men asked Alexander if there was a bag or something they could use. He went into another room and got a backpack. When he returned, the pair told the others to get out of the closet. Shortly after, Alexander heard a knock at the door. One or both suspects walked behind him to the front door while holding a gun on him. When Alexander opened the front door, three or four people he did not know were standing outside. The suspect told everyone to get inside. According to Alexander, the suspect

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[3] Undesignated dates in the statement of facts are from the year 2015.

Pursuant to California Rules of Court, rule 8.90, we refer to certain persons by their first names and/or initials. No disrespect is intended.

told them to get on the ground and hand over their wallets and cell phones, then everyone was moved into the back bedroom. At some point, Alexander, Leopoldo, T.J., and the newcomers all were in the closet.

At approximately 8:00 that evening, Jacob C., Nolan C., Ryan M., Seth M., Savion T., and Aries P. went to the apartment. Seth and Ryan stopped to smoke a cigarette near the patio, while the others went to the front porch. Nolan knocked, and the door was opened after about five seconds. There were two men standing in the doorway. Both were African-American; one — defendant — was tall, while the other one was shorter and wore glasses. Nolan's group asked if Sam was there. The men said yes and welcomed the group inside.

Once the group came inside, the shorter man closed the door. He and defendant both put on ski masks with holes cut out for the eyes and mouth. Defendant had a silver and rusted metallic semiautomatic handgun, while the shorter man had a smaller black handgun.[4]

Defendant and his companion immediately started shoving the group away from the entranceway. They pointed their guns at the group of friends and pushed them further into the apartment. They moved the group out of the living room, into a short hallway, and into a very small closet.[5] An Asian male and a Hispanic male, with whom Jacob was not acquainted at the time, were already in the closet. That meant six people were in the closet at that point. It was "[e]xtremely" cramped.

Defendant and his companion told the group not to move and asked where the safe was. When Savion and Nolan asked what safe, defendant and the shorter man said, "You

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[4] According to Aries, Jacob and Ryan were the ones smoking, while Aries, Nolan, and Savion were "greeted with guns pointed at [their] face[s]." Both suspects had their ski masks on as soon as Aries and his companions walked in. They wore the masks the entire time.

[5] Jacob estimated the hallway was about six feet long, while it was about 15 feet from the apartment entrance to the closet.

know what we're talking about, the safe, Sam's safe." Defendant and his companion then commanded each man in turn to take everything out of his pockets.[6] While this was happening, one man pointed his gun at the person emptying his pockets, while the other was waving his gun at the rest of those in the closet. Those in the closet handed over wallets and/or cell phones.[7] One of the men said to tell Sam that two men had come and that Sam had to pay them. They said Sam owed them $2,000.

Meanwhile, Ryan and Seth were outside, smoking. At some point, a tall African-American man came up to them and told them to put out the cigarettes and follow him inside. Once inside, Ryan saw the shorter African-American man waiting at the opposite end of the living room. That shorter man was holding a small black handgun. The taller man then put a black and tan handgun to Ryan's back. The men told Ryan and Seth to drop whatever they had on them.

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[6] According to Aries, the two men told the group to empty out their pockets, then they said to get in the back closet.

[7] It was at this point that the taller man removed his ski mask, and Jacob was able to see his face. On December 7, Jacob selected defendant's picture from a photographic lineup. At trial, Jacob identified defendant as the taller man. Aries kept his head down and so never saw the taller suspect's face. He testified at trial that he could not have identified the perpetrators at any time. According to Detective Cushman of the Ridgecrest Police Department, however, the department issued a press release on December 10 that consisted of photographs of defendant and the other suspect and a brief summary of what had occurred. When Cushman met with Aries on December 23, Aries said he had seen the press release, and the suspects in the photographs were the perpetrators. Ryan saw both suspects with and without their ski masks, but could not recall what their faces looked like at trial. Alexander identified defendant from a photographic lineup shown to him on December 7. Several months later, however, Alexander wrote a letter to the district attorney's office in which he stated his belief that any statement he provided should be discredited due to his inebriation at the time of the robbery and his poor vision. At trial, he testified that had he not previously looked at photographs, he would not have been able to pick out anyone in the courtroom.

According to Aries, the two men told the group to empty out their pockets, then they said to get in the back closet. About three minutes later, Jacob and Ryan were thrown into the closet.

At some point, defendant ordered Ryan into the closet at gunpoint. The shorter man struck Seth in the face and shoved him into the closet. Defendant and the shorter man then ordered Ryan and Seth to stand up, one at a time, and empty out their pockets. They then closed the closet doors. There were now eight people in the closet.

Jacob heard defendant and the other man walk toward the living room. A Hispanic male eventually opened the closet door and asked why they were in the closet. Defendant and his companion were gone. Jacob estimated that he was in the closet for 10 minutes, and that five minutes elapsed from the time defendant and the shorter man shut the closet doors on the eight individuals to when the Hispanic male opened the closet door. Ryan, Jacob, Nolan, and Seth then drove to the police station to report what had happened.

On December 7, Cushman was at the apartment on East Commercial when Samuel C. arrived. Samuel showed Cushman incoming text messages on his cell phone. The messages read, "Call back, pussy. You gotta pay up"; "I'm watching your pad. Call me so we can talk"; "You talking to police"; and "Sammie?"

On the morning of December 10, defendant was apprehended in Las Vegas, Nevada. He was the sole occupant of a black Lexus ES sedan.[8] A backpack in the trunk contained paperwork bearing defendant's name; a loaded, .40-caliber, black and steel semiautomatic handgun; and two cell phones. The number of one of those cell phones matched the number associated with the text messages Samuel showed Cushman on December 7.

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[8] On February 4, Cushman was present during a traffic stop in which defendant was the sole occupant of the same vehicle. At trial, Cushman was able to recognize defendant from security video obtained from a camera outside the apartment where the robbery occurred. The video also showed a vehicle consistent with the Lexus in the area of the apartment. Other video showed Henry F. ("the shorter one") walking to the vehicle, followed by defendant. The vehicle trunk was opened, and defendant attempted to place a safe in the trunk. He ended up going around to the rear passenger door and putting it in the car. Henry appeared to be carrying a backpack. The vehicle then drove away.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence to sustain his convictions on counts 4 through 9, kidnapping to commit robbery. He claims the movements of the victims were merely incidental to the robberies and did not increase the risk of harm over and above that necessarily present in the underlying crimes. We disagree.

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "If the circumstances reasonably justify the [trier of fact's] findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Instead, reversal is warranted only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 209, subdivision (b) proscribes aggravated kidnapping, i.e., kidnapping to commit robbery or an enumerated sex offense. Under this section, "the victim must be forced to move a substantial distance, the movement cannot be merely incidental to the

target crime, and the movement must . . . increase the risk of harm to the victim. Application of these factors in any given case will necessarily depend on the particular facts and context of the case." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153 (*Dominguez*), italics omitted; see, e.g., *People v. Martinez* (1999) 20 Cal.4th 225, 232-233, 236-237; *People v. Rayford* (1994) 9 Cal.4th 1, 12-14; *People v. Daniels* (1969) 71 Cal.2d 1119, 1134, 1139 (*Daniels*).)[9]

The two elements — nonincidental movement of the victim and increase in the risk of harm to the victim — "are not mutually exclusive but are interrelated. [Citations.]" (*People v. Vines* (2011) 51 Cal.4th 830, 870, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

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9 *Dominguez* states the test as requiring a *substantial* increase in the risk of harm to the victim. (*Dominguez, supra*, 39 Cal.4th at p. 1153.) That is the so-called *Daniels* test. In *Daniels, supra*, 71 Cal.2d at page 1139, the California Supreme Court held that section 209 "exclude[d] from its reach not only 'standstill' robberies [citation] but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. [Citation.]" *Daniels* relied in part on the definition of kidnapping contained in former section 207, to wit, a carrying of a person " 'into another country, state, or county, or into another part of the same county . . . .' " (*Daniels, supra*, at pp. 1126, 1131.)

The *Daniels* test was applicable to the statute construed in *Dominguez*. (*Dominguez, supra*, 39 Cal.4th at pp. 1149-1150 & fn. 5.) After the offense at issue in *Dominguez* was committed, however, section 209 was revised to read in pertinent part, as it does today: "(b)(1) Any person who kidnaps or carries away any individual to commit robbery, [or an enumerated sex offense], shall be punished by imprisonment in the state prison for life with possibility of parole. [¶] (2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (Stats. 1997, ch. 817, §§ 1-2.) Thus, although *Daniels* continues to state the basic requirements for a violation of section 209, subdivision (b)(2) of that statute no longer requires that the movement " 'substantially' " increase the risk of harm to the victim, contrary to much of the decisional authority of the California Supreme Court. (*People v. Martinez, supra*, 20 Cal.4th at p. 232, fn. 4.)

> "With regard to the first prong, the jury considers the 'scope and nature' of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.]
>
> " ' "The second prong of the *Daniels* test refers to whether the movement subjects the victim to a[n] . . . increase in risk of harm above and beyond that inherent in [the underlying crime].[**10**] [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased." ' [Citation.]" (*People v. Vines, supra*, 51 Cal.4th at p. 870.)

"There is no merit to the contention that whether a kidnap[p]ing occurred depends on the *distance* covered by the asportation. The test is whether the asportation was *substantial* which in turn depends upon the circumstances of the case. [Citation.]" (*People v. Ellis* (1971) 15 Cal.App.3d 66, 73.) "Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient." (*Dominguez, supra*, 39 Cal.4th at p. 1152.) "Where movement changes the victim's environment, it does not have to be great in distance to be substantial. [Citation.]" (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 (*Shadden*).)[**11**]

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10 The risk may be of physical or psychological harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 886.)

11 We recognize *Shadden* involved a kidnapping to commit rape (*Shadden, supra*, 93 Cal.App.4th at p. 167), and that "[k]idnapping for the purpose of robbery is not analogous to kidnapping for the purpose of rape" (*People v. Robertson* (2012) 208 Cal.App.4th 965, 986). This does not mean, however, that kidnapping to commit robbery necessarily requires lengthier asportation before a conviction under section 209 can be upheld.

In the present case, although the distance the victims were forcibly moved was not lengthy, they were not merely moved around inside the premises. The movement was substantial.

"Brief movements to facilitate . . . robbery . . . are incidental thereto within the meaning of *Daniels*. [Citations.] On the other hand movements to facilitate the foregoing crime . . . that are for a substantial distance rather than brief are not incidental thereto within the meaning of *Daniels*. [Citations.]" (*In re Earley* (1975) 14 Cal.3d 122, 129-130.) We have concluded the movement of the victims in the present case was substantial. Moreover, while moving the victims and shutting them in the closet may have made it easier for defendant and his coperpetrator to steal the safe and other items from the apartment, the movement of the victims was neither necessary to nor facilitated the robbery of the victims themselves. Those who had their wallets and cell phones taken just before being made to enter the closet could have had those belongings taken upon entry into the apartment. Where those belongings were taken before the particular victim was moved to the closet, the movement was unnecessary. " '[A] movement unnecessary to a robbery is not incidental to it at all.' [Citations.]" (*People v. Leavel* (2012) 203 Cal.App.4th 823, 835; cf. *People v. Washington* (2005) 127 Cal.App.4th 290, 299-300.)

"The 'risk of harm' test is satisfied when the victim is forced to travel a substantial distance under the threat of imminent injury by a deadly weapon. [Citation.]" (*In re Earley*, *supra*, 14 Cal.3d at p. 131, fn. omitted, superseded by statute on another point as stated in *People v. Vines*, *supra*, 51 Cal.4th at p. 869 & fn. 20.) Here, the victims were moved at gunpoint. According to Jacob, Aries was shaking and would not respond when Savion nudged him and asked if he was okay. Ryan described conditions inside the closet as "cramped" and "elbow to elbow." Thus, there was evidence of increased risk of both physical and psychological harm.

The victims in the present case were in grave danger during and after the asportation. There can be little doubt that had defendant and/or his cohort started

shooting, the victims would not have escaped unscathed. Under the circumstances, a rational juror could have concluded the movement was substantial and increased the risk of harm to the victims. That the perpetrators did not fire their weapons and the victims only spent minutes in the closet does not change this.

We have undertaken "a 'multifaceted, qualitative evaluation' of the evidence," in which we have considered the totality of the circumstances viewed in the light most favorable to the People. (*People v. Corcoran* (2006) 143 Cal.App.4th 272, 279, 280.) We conclude substantial evidence supports the kidnapping for robbery convictions (counts 4-9).

II

PROSECUTORIAL MISCONDUCT

Defendant contends the prosecutor committed misconduct by attempting to shift to the defense the burden of calling a witness. We find the issue forfeited for failure to object on this ground at trial. We reject defendant's further claim trial counsel's omission constituted ineffective assistance of counsel.

A. Background

During his summation, defense counsel told the jury:

> "Ladies and gentlemen, we've been looking at Mr. Jones for two weeks now. You've seen Mr. Jones. You're in as good a position as anyone to assess who was in that video.
>
> "So if you haven't guessed already, my position is that there's one major problem with [the prosecutor's] case, and that is that *Elliot Jones was not there. He's not there during the incident at all*. [¶] . . . [¶]
>
> "I think it's worthwhile, as we start to consider this aspect of the case, that there were other suspects discussed, even placed into photo lineups for the victims to look at prior to this suspicion that Mr. Jones might have been involved. [¶] . . . [¶]
>
> "Now, by way of further context, remember also Detective Winn's testimony when they were called upon to help look for Mr. Jones, Detective

Winn told us 'Well, we had a couple of addresses in Las Vegas that we were checking out.'

"Okay. So there's some backdrop for this supposed identification.

"So we have these identifications by the victims that I want to talk about for a little bit.

"Recall that these are the same witnesses/victims who had very little consistency in describing the guns, which seems more basic than trying to remember the exact look of a person, but be that as it may.

"You also heard in the instructions the judge read that the topic of cross-racial identification, one of the factors you're able to consider in identification is the race involved, and . . . basically, whether a person is making an identification of a person who's a different race. . . .

"And that's exactly what happened here. We have an African-American suspect and non-African-American witnesses. So keep that in mind.

"So let's take a moment to talk about the victims who we heard from. [¶] . . . [¶]

"So we have very different accounts from the eyewitnesses as to whether Mr. Jones was involved in this incident . . . . [¶] . . . [¶]

"What we have here is questionable eyewitness identification leaving us with these other issues. We have a photograph that's dramatically different in appearance, at least as far as the nose is concerned." (Italics added.)

In his closing argument, the prosecutor observed that four of the victims were shown photographic lineups on the night of the incident that included two possible suspects. The victims did not identify either of those men. The prosecutor continued:

"They weren't just out to identify or to pick somebody for the crime at the first chance. They all had a chance that night to pick somebody out. Not one of them did, because the defendant wasn't included in any of those photographic lineups.

"*The defense does not have a burden in this case. The burden of proof is on me. But, like the prosecution, the defense has the ability to subpoena witnesses.*

"*The defense's almost entire argument is that the defendant wasn't there, he had nothing to do with it, yet the defense can't call a logical witness? They can't call a witness who can say the defendant was with me on December 5th, 2015, in Las Vegas and not in Ridgecrest, California? Where is the alibi witness? They can subpoena a witness just like the prosecution.*

"[DEFENSE COUNSEL]: Objection. *Misstates the law*. [¶] . . . [¶]

"THE COURT: It's overruled. We'll put it on the record later.

"[PROSECUTOR]: Where is the alibi witness?

"We heard from multiple witnesses who told you where the defendant was on December 5th, 2015. . . . [¶] . . . [¶]

"Is it possible that a witness could misidentify the defendant? Yeah, that could happen.

"Is it possible that two could do it? Yeah, it's possible.

"Is it possible . . . that three could misidentify the defendant? Once again, anything's possible.

"Is it possible that we could also have cell phone text messages from a phone found in the defendant's possession texting Samuel [C.], the person the suspects were saying owed them money, with text messages telling him to pay them back? Once again, anything's possible, but it's not reasonable.

"When you add up all of that together and the surveillance video, the only reasonable conclusion is Elliot Jones was there. He committed these crimes against all of these victims." (Italics added.)

At the next recess, the court allowed the parties to make a record of what took place. This ensued:

"THE COURT: . . . . [¶] There was an objection during the People's rebuttal argument when [the prosecutor] stated, 'They can subpoena a witness just like the prosecution.' At that time there was an objection with a response saying that it misstates the law. That objection was overruled. [¶] [Defense counsel], is there – because you asked for a sidebar at that time, is there anything you'd like to put on the record in that regard?

"[DEFENSE COUNSEL]: . . . [¶] . . . [M]y recollection of the statement included a reference to Las Vegas, and as the Court's well aware, Nevada's beyond the California jurisdiction for normal subpoena process.

"THE COURT: This Court has participated in circumstances under which even defense has . . . requested subpoenas be issued for out-of-state process and service, and so I know that that is something that has been utilized both on behalf of the defense and the prosecution.

"That was the basis for the objection and the result by this Court. The Court did listen attentively to the stated reason for the objection and overruled it on that ground. [¶] . . . [¶]

"[DEFENSE COUNSEL]: I would assert that that statement and the whole discussion of alibi witnesses is beyond the scope and I would move to reopen closing argument.

"THE COURT: The request to reopen is denied.

"The request — since there has not been a request to strike that portion, the Court's not going to take any position on it. The Court did anticipate a potential objection at that time in that regard, but did not hear the appropriate grounds."

After the jury retired to deliberate, defense counsel moved for a mistrial "based on prosecutorial misconduct for misstating the law as to the issue . . . discussed during closing argument." The motion was denied.

B. Analysis

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an

assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, e.g., *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 31.)

In the present case, defendant failed to object to the prosecutor's comments about an alibi witness on the same ground — shifting the burden — he now seeks to raise.[12] Accordingly, his claim has been forfeited.

Anticipating this conclusion, defendant says trial counsel's omission constituted ineffective assistance of counsel. The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v.*

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12 In his opening brief, defendant attempts to bring the prosecutor's comments within the scope of the objection actually made, by claiming "[t]he prosecutor's assertion that the defense had to produce an alibi witness to demonstrate the unreliability of the eyewitness identifications was an incorrect statement of the law, as trial counsel said." We are not persuaded. It is clear, from defense counsel's subsequent statements outside the jury's presence, that the objection was aimed at the prosecutor's suggestion the defense could subpoena a witness outside California.

Cunningham (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)[13]

Defendant fails to convince us defense counsel's performance was deficient. "The prosecution is given wide latitude during closing argument to make fair comment on the evidence . . . . [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 345.) "In particular, '[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel.' [Citations.]" (*People v. Reyes* (2016) 246 Cal.App.4th 62, 74, fn. omitted.) The prosecutor is not prohibited "from commenting on the state of the evidence presented at trial, or on the defense's failure to introduce material evidence or to call witnesses other than the defendant. [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 633.)

Although defendant argues his defense was one of mistaken/unreliable eyewitness identification as opposed to alibi, we cannot say, considering both parties' arguments as a whole, that the prosecutor's reference to calling an alibi witness was improper. It would not have been illogical for the defense to call such a witness under the circumstances of the case. (See *People v. Morris* (1988) 46 Cal.3d 1, 35-36, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, 545, fn. 6.)

Moreover, the challenged statements were prefaced by the prosecutor reminding jurors that he had the burden of proof while the defense had none, as well as by the court's instructions that the People had the burden of proof beyond a reasonable doubt, including that it was defendant who committed the charged crimes, and that neither side was required to call all witnesses who might have information about the case. "[H]ad any juror interpreted the comments to indicate that defendant had a burden of proof, this impression would have been dispelled by" the instructions and the prosecutor's reminder.

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13 The "reasonable probability" test applies even when a more stringent test would apply had the issue not been forfeited. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008-1009; see *Weaver v. Massachusetts* (2017) 582 U.S. ___, ___-___ [137 S.Ct. 1899, 1910-1912].)

(*People v. Redd* (2010) 48 Cal.4th 691, 740; see *People v. Cook* (2006) 39 Cal.4th 566, 608.) A reasonably competent attorney could well have presumed the jury would follow the instructions given (see *People v. Bennett* (2009) 45 Cal.4th 577, 596), and so determined that a "shifting the burden" objection would have been futile or unnecessary (see *People v. Price* (1991) 1 Cal.4th 324, 387). In addition, the trial court reasonably could have concluded defendant was not prejudiced by the incident, and so it did not abuse its discretion by denying the motion for mistrial. (See generally *People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154.)

III

SENTENCING ISSUES

A. The Sentencing Proceedings

Defense counsel argued the probation officer's recommendation of life in prison plus 129 years was disproportionate, as the case was "on the milder side of the spectrum of these types of cases," and the incident was short and resulted in only moderate losses and no significant injuries. Counsel observed that the punishment for first degree murder was 25 years to life, and he urged the court to impose a determinate sentence "in the teens." The prosecutor responded that the case involved nine victims, most of whom were around or under the age of 18 at the time of the incident, and that it was a traumatic event for them.

As previously stated, the trial court denied defendant's request to dismiss his prior strike conviction. The court observed that while defendant's prior convictions were not numerous, he suffered a conviction for robbery, which was identical to the current charges. The court found this significant. The court noted that in 2002, defendant was sentenced to prison for five years for the robbery conviction, then he incurred two additional convictions in 2008, for which he again was sentenced to prison. The court found defendant had spent a large portion of time in prison, which was significant as it

related to his ability to commit additional crimes. The court concluded it could not find defendant to be outside the spirit of the three strikes law, and so denied the request.

The court first sentenced defendant on the counts carrying indeterminate terms. With respect to counts 4 through 9 (kidnapping to commit robbery), the court sentenced defendant on each count to fully consecutive terms of life in prison with the possibility of parole with a minimum parole eligibility date of 14 years (seven years, doubled pursuant to § 667, subd. (e)), plus a 10-year enhancement pursuant to section 12022.53, subdivision (b), plus a five-year enhancement pursuant to section 667, subdivision (a), plus a one-year enhancement pursuant to section 667.5, subdivision (b).

With respect to the determinate terms, the court found no circumstances in mitigation. In aggravation, it found that the crimes involved planning and sophistication, and defendant's prior performance on parole was unsatisfactory in that he reoffended. The court stated: "While it is not a quantitative comparison, the Court does treat the circumstances qualitatively. It does appear to the Court that when considering them qualitatively, the defendant certainly is a justified candidate for the upper term."

As to count 20 (robbery), the court imposed the upper term of 12 years, plus a 10-year enhancement pursuant to section 12022.53, subdivision (b), plus a five-year enhancement pursuant to section 667, subdivision (a), plus a one-year enhancement pursuant to section 667.5, subdivision (b). The court ordered the sentence to be fully consecutive to the sentence imposed on count 9. As to count 12 (false imprisonment), the court imposed a consecutive term of one year four months (one-third of the middle term) plus an enhancement of one year four months (one-third of the middle term) pursuant to section 12022.5, subdivision (a). The court imposed the same base term and enhancement on count 13 (false imprisonment), and ordered that sentence to run consecutively to the sentence imposed on count 12.

For the remaining false imprisonment convictions (counts 11 & 14-19), the court imposed, as to each count, the upper term of six years, enhanced by four years pursuant

to section 12022.5, subdivision (a), then stayed punishment pursuant to section 654. For the remaining robbery convictions (counts 21-26), the court imposed, as to each count, the upper term of 12 years, enhanced by 10 years pursuant to section 12022.53, subdivision (b), then stayed punishment pursuant to section 654. As to count 27 (unlawful possession of a firearm), the court imposed the upper term of six years. As to count 10 (first degree burglary), the court imposed the upper term of 12 years, enhanced by four years pursuant to section 12022.5, subdivision (a). Punishment on counts 10 and 27 was stayed pursuant to section 654.

Defendant's aggregate punishment was six consecutive indeterminate terms of life in prison with the possibility of parole, each with a minimum parole eligibility date of 14 years, plus a determinate term of 129 years, four months.

B. Imposition of Status Enhancements on More than One Count

In his opening brief, defendant contends the trial court erred by imposing enhancements pursuant to sections 667, subdivision (a) and 667.5, subdivision (b) on counts 4 through 9 (indeterminate terms) and 20 (determinate term). He says the enhancements should have been imposed only once. In his reply brief, he agrees with the Attorney General that the enhancements were properly imposed "on the indeterminate terms in counts nine" [*sic*] under the authority of *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*). We assume defendant meant his concession to encompass counts 4 through 9. In any event, the Attorney General is correct: Status enhancements are properly imposed only once where there are multiple determinate terms, but they are properly imposed more than once with respect to multiple indeterminate terms.

In *People v. Tassell* (1984) 36 Cal.3d 77, overruled on another ground in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, the California Supreme Court examined section 1170.1 and concluded the statute "refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions . . . are of the first sort. The second kind of

enhancements [are] those which arise from the circumstances of the crime . . . . Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence" (*Tassell, supra*, at p. 90).

In *Williams*, the state high court concluded section 1170.1 applies only to determinate sentences, and is inapplicable to multiple indeterminate sentences imposed under the three strikes law. (*Williams, supra*, 34 Cal.4th at p. 402.) Accordingly, it held that a prior conviction enhancement may be added to an indeterminate third strike sentence for each new offense. (*Id*. at p. 400.)

In *People v. Misa* (2006) 140 Cal.App.4th 837, the defendant was sentenced to an indeterminate life term upon his conviction for torture plus a determinate term for two counts of aggravated assault. The Court of Appeal found *Williams*'s analysis to be applicable, and so concluded a prior serious felony enhancement properly was imposed once on the torture count and a second time on one of the assault counts. (*Id*. at pp. 840, 846.)

In *People v. Sasser* (2015) 61 Cal.4th 1, the defendant had suffered one prior strike conviction. Accordingly, the base term for each of his determinate sentences was doubled. (*Id*. at p. 12.) The California Supreme Court held that *Tassell* controlled; hence, the prior serious felony enhancement could be added only once to multiple determinate terms imposed as part of a second-strike sentence. (*Sasser*, *supra*, at pp. 6, 15-17.)

The foregoing authorities lead to the conclusion that "[p]rior serious felony enhancements are added once to each count on which an indeterminate sentence is imposed and once for the combined counts on which an aggregate determinate term has been imposed. [Citations.]" (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1141.) The same is true with respect to prior prison term enhancements. (*People v. Minifie* (2018) 22

Cal.App.5th 1256, 1260, 1263-1265.) Accordingly, the indeterminate term imposed in the present case on counts 4 through 9 properly was enhanced, as to each count, by five years pursuant to section 667, subdivision (a), plus one year pursuant to section 667.5, subdivision (b). The aggregate determinate term properly was similarly enhanced once.

C. Senate Bills Nos. 620 and 1393

Defendant was sentenced on November 8, 2017. At that time, the trial court lacked discretion to strike serious felony and firearm enhancements. (§§ 667, former subd. (a)(1), 1385, former subd. (b), 12022.5, former subd. (c), 12022.53, former subd. (h).) Effective January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, §§ 1-2), gave trial courts discretion to strike or dismiss enhancements imposed pursuant to sections 12022.5 and 12022.53 "in the interest of justice pursuant to Section 1385 . . . ." (§§ 12022.5, subd. (c), 12022.53, subd. (h).) Effective January 1, 2019, Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1-2) removed the restrictions contained in sections 667, subdivision (a)(1) and 1385 on striking serious felony enhancements. Defendant now contends his case should be remanded to afford the trial court the opportunity to exercise its discretion with respect to each affected enhancement.[14]

Defendant's case was not yet final when the foregoing amendments went into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) In light of this fact and the fact the changes in the law now vest the trial court with authority to lower defendant's sentence, we conclude the amendments apply to the instant case, as the Attorney General concedes. (*People v. Stamps* (2019) 34 Cal.App.5th 117, 120, review granted June 12, 2019, S255843; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660,

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[14] The parties' initial briefs addressed only Senate Bill No. 620. We directed them to file supplemental briefs concerning Senate Bill No. 1393.

678-679; see *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Nevertheless, we conclude a remand would be futile.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' [Citation.] (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) "The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court's statements and sentencing decisions to infer what its intent would have been. [Citations.]" (*People v. Jones* (2019) 32 Cal.App.5th 267, 273.)

Although the court here did not say, in so many words, that it intended to impose the maximum sentence, its statements and sentencing choices leave no room for any other reasonable conclusion. In addition to noting defendant's three prior felony convictions and subsequent prison terms, one of which was "identical to the allegations charged in this case," the court chose to impose the upper term on every count as to which sentence was stayed.[15] It chose not to exercise its discretion to strike the section 667.5,

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15 The Attorney General notes the trial court denied defendant's *Romero* request, which was directed at the same prior conviction that formed the basis for the prior serious felony enhancement. Whether a dismissal is "in furtherance of justice" within the meaning of section 1385, subdivision (a) must be determined "by looking within the [sentencing] scheme in question, as informed by generally applicable sentencing principles . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 160.) Where the sentencing scheme in question is the three strikes law, "the court . . . must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious

subdivision (b) prior prison term enhancement (*People v. Bradley* (1998) 64 Cal.App.4th 386, 395) but, instead, imposed it on each indeterminate term and on the aggregate determinate term. Our review of the evidence in the record reveals no possibility the trial court would strike any of the enhancements were we to remand. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; cf. *People v. Pride* (2019) 31 Cal.App.5th 133, 142.)

DISPOSITION

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.

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and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.) "[T]he circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) "Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm . . . ." (*Ibid.*) The Attorney General does not suggest such circumscribed discretion applies to a decision whether to dismiss or strike a firearm or prior serious felony enhancement.